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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ERVIN SOMMER,

Plaintiff and Appellant,

v.

LINDA HAWKES as Trustee, etc., et al.,

Defendants and Respondents.

D055706

(Super. Ct. No. GIN053023)

APPEAL from a judgment of the Superior Court of San Diego County, Robert P. Dalquist, Judge. Affirmed.

I.

INTRODUCTION

Ervin Sommer filed this action against Linda Hawkes, as trustee of the Julia Hawkes Family Trust (the Trust), Mark L. Pierce, and Jane L. Pierce (collectively the

Pierces).¹ In his single cause of action complaint, Sommer sought to foreclose on a deed of trust recorded in August 1997 on certain real property in Escondido that the Trust sold to the Pierces in October 2005. The defendants filed a motion for judgment on the pleadings on the ground that res judicata barred this action. The defendants argued that a trial court had determined in another action that the August 2007 deed of trust was invalid. (*In the Matter of the Julia Jeppesen Hawkes Family Trust* (Super. Ct. San Diego County, 2005, No. PN22173) (sometimes referred to as "case No. PN22173").) The trial court granted the defendants' motion for judgment on the pleadings without leave to amend, and entered a judgment of dismissal.

On appeal, Sommer contends that the action in case No. PN22173 was an "unrelated case" and that he was not a defendant in that matter. Sommer also claims that the judgment must be reversed for several other reasons, including that the trial court was "prejudiced and biased," and that the trial court improperly permitted Linda Hawkes's attorney "to intrude in [the] court proceeding[s]." We affirm the judgment.

¹ In his complaint, Sommer named the "Julia Hawkes Family Trust" as a defendant. "[A] trust itself can neither sue nor be sued in its own name. Instead, the real party in interest in litigation involving a trust is always the trustee." (*Presta v. Tepper* (2009) 179 Cal.App.4th 909, 914.) In this case, Linda Hawkes, as trustee of the Julia Hawkes Family Trust, is the proper defendant.

II.

FACTUAL AND PROCEDURAL BACKGROUND²

In June 2006, Sommer filed a complaint seeking judicial foreclosure of a deed of trust recorded on August 8, 1997, on a parcel of real property (parcel No. 233-052-03) in Escondido (the Escondido Property).³ Sommer claimed that the Trust had granted the deed of trust to him to secure the Trust's obligations on a promissory note in the amount of "\$75,000 or more" that the Trust had executed on August 8, 1997. Sommer claimed that he had acted as the trustee of the Trust, that the Trust had defaulted on its obligations under the promissory note, and that he was therefore entitled to foreclose on the deed of trust on the real property.

Sommer also alleged that Linda Hawkes was the successor trustee of the Trust. Sommer attached to his complaint a grant deed that was recorded in October 2005 on the

² We grant the defendants' motion to augment the record on appeal with several documents contained in the trial court file that were not contained in the clerk's transcript, including a November 2006 ruling abating this action, this court's opinion affirming the trial court's judgment in case No. PN22173 (*Hawkes v. Sommer* (May 27, 2008, D050196) [nonpub. opn.] (*Hawkes*)), and the defendants' November 2008 motion for judgment on the pleadings. In light of our ruling augmenting the record, we deny the defendants' alternative motion to dismiss the appeal for lack of an adequate record. Although the copy of our opinion in *Hawkes, supra*, D050196, that is contained in the augmented record is missing several pages, we have obtained the missing pages and take judicial notice of the entire opinion.

³ We restrict our discussion of the lengthy factual and procedural history between the parties to that which is necessary to resolve the present appeal. In *Hawkes, supra*, D050196, this court provided a detailed discussion of the underlying litigation and noted that "[t]his appeal is Sommer's ninth arising out of proceedings relating to the Trust."

Escondido Property. The grant deed states that Linda Hawkes, as successor trustee of the Trust, transfers the Escondido Property to the Pierces.

In September 2006, the trial court sustained Linda Hawkes's demurrer and abated this action on the ground that the same cause of action was pending in another action between the parties — i.e., case No. PN22173.⁴

In November 2008, the trial court granted defendants' motion to reinstate this action on the ground that the litigation in case No. PN22173 was now final. Shortly thereafter, the defendants filed a motion for judgment on the pleadings on the ground that res judicata barred this action. The defendants argued that the trial court in case No. PN22173 had determined that the August 1997 deed of trust was invalid, and that this court had affirmed the judgment in case No. PN22173. The trial court concluded that this action was barred by the doctrine of res judicata, granted the defendants' motion for judgment on the pleadings without leave to amend, and entered a judgment of dismissal.

Sommer timely appeals the judgment.

III.

DISCUSSION

Sommer claims that the trial court erred in granting the defendants' motion for judgment on the pleadings. We apply the de novo standard of review to this claim.

(*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.)

⁴ The demurrer is not in the record on appeal.

A. *Collateral estoppel bars this action*

"Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.'" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).) The *Mycogen* court noted that "the term 'res judicata' has been used to encompass both claim preclusion and issue preclusion." (*Id.* at p. 896, fn. 7.)

The doctrine of collateral estoppel applies if the following elements have been established:

"First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]' [Citation.]" (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1505 (*Smith*).)

In case No. PN22173, Linda Hawkes, as trustee of the Trust, was the plaintiff; Sommer was the defendant. In the statement of decision in case No. PN22173, the court indicated that Hawkes had sought a declaration that the August 8, 2007 deed of trust on the Escondido Property was invalid. The court ruled that Hawkes was "entitled to have the subject notes and deed of trust cancelled." In addition, in the judgment in case No. PN22173, the trial court stated in relevant part: "The promissory notes dated August 8, 1007, signed by Sommer, and the deed of trust, recorded against the [T]rust's

real property, APN 233-052-03, also signed by Sommer, were invalid from the inception. . . ."

In our May 2008 opinion affirming the judgment in case No. PN22173, this court held:

"[A]s the trial court found here and Sommer concedes, the Notes and the Deed of Trust existed purely by virtue of the existence of an alleged obligation by the Trust to pay Sommer additional compensation. Because it has been finally determined that no such obligation exists, the trial court correctly determined that Sommer's attempt to enforce the Notes and the Deed of Trust (whether against the Trust or against the purchaser of the Escondido Property) was improper." (*Hawkes, supra*, D050196.)

In this case, Sommer seeks to foreclose on the same deed of trust that the court in case No. PN22173 determined to be invalid. In so doing, Sommer seeks to relitigate the same issue that was argued and finally decided in case No. PN22173. The trial court therefore properly concluded that this action is barred by the preclusive effect of the judgment in case No. PN22173 under the doctrine of issue preclusion. (*Mycogen, supra*, 28 Cal.4th at p. 896; *Smith, supra*, 164 Cal.App.4th at p. 1505 [listing elements].) The only argument that Sommer provides in opposition is his assertion, with no citation to the record, that the defendants' motion for judgment on the pleadings in this action involved an "unrelated case" and that Sommer was "not connected to that case as a party[]defendant." The judgment in case No. PN22173 specifically refers to the August 8, 2007 deed of trust on the Escondido Property and declares that deed of trust to be "invalid." Further, our opinion affirming that judgment in *Hawkes, supra*, D050196, lists Sommer as a defendant. Accordingly, Sommer's contention is wholly without merit.

B. *None of Sommer's other arguments have any merit*

Although it is difficult to determine from Sommer's brief, Sommer appears to contend that the judgment must be reversed for several additional reasons. To begin with, Sommer claims that the Pierces have not objected to Sommer's attempt to foreclose on the deed of trust, and that the trial court improperly permitted Linda Hawkes's attorney to appear in the case. This claim is belied by the record. The defendants' motion for judgment on the pleadings was signed by an attorney on behalf of Linda Hawkes as trustee of the Trust *and* the Pierces.

Sommer contends that the trial court was "prejudiced and biased." Sommer cites nothing in the record to support this contention. Accordingly, we reject this argument.

Sommer contends that the trial court erred by failing to allow the action "to proceed per civil due process: [d]iscovery, deposition, interrogatory, present evidence and testimony, [case management conference], [and] trial." The purpose of a motion for judgment on the pleadings "is to test the sufficiency of the pleadings, so the court does not consider testimonial evidence or information extraneous to the complaint and judicially noticed matters." (*Velez v. Smith* (2006) 142 Cal.App.4th 1154, 1161.) Therefore, the trial court did not err in refusing to allow Sommer to engage in the discovery process and present his case at a trial.

Finally, Sommer spends the bulk of his brief rearguing the merits of the validity of his claim for foreclosure on the August 2007 deed of trust on the Escondido Property, including providing a list of statutes that he claims govern the foreclosure process. For the reasons stated in part III.A., *ante*, the validity of Sommer's claim was completely and

finally determined in case No. PN22173. Sommer may not relitigate that issue in this action. (*Mycogen, supra*, 28 Cal.4th at p. 896 [principles of collateral estoppel preclude relitigation of issues argued and decided in prior proceedings].) Sommer's contentions as to the merits of his claim provide no basis for reversal of the judgment.

IV.

DISPOSITION

The judgment is affirmed. Sommer is to bear all costs on appeal.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.